

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

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|-------------------------------|---|---------------------------|
| NORTH EVERETT NEIGHBOR |) | |
| ALLIANCE (NENA) and NEIGHBORS |) | Case No. 08-3-0005 |
| FOR NEIGHBORHOODS, |) | |
| |) | (NENA) |
| Petitioners, |) | |
| |) | |
| v. |) | |
| |) | ORDER ON MOTIONS |
| THE CITY OF EVERETT, |) | |
| |) | |
| Respondent, and |) | |
| |) | |
| PROVIDENCE REGIONAL MEDICAL |) | |
| CENTER EVERETT, |) | |
| |) | |
| Intervenor. |) | |
| |) | |

I. BACKGROUND

On November 3, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the North Everett Neighbor Alliance and Neighbors for Neighborhoods (together, **Petitioners** or **NENA**). The matter was assigned Case No. 08-3-0005, and is hereafter referred to as *NENA v. City of Everett*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioners challenge the City of Everett's (**Respondent** or **City**) adoption of Ordinance No. 3090-08 amending the City's Comprehensive Plan adopting an implementing zone [rezone], and adopting the Master Plan for a portion of Providence Regional Medical Center Everett¹ (**Providence Everett** or **PEMC**). The basis for the challenge is non-compliance with various provisions of the Growth Management Act (**GMA or Act**) and the State Environmental Policy Act (**SEPA**).

On November 26, 2008, the Board received Providence Regional Medical Center Everett's Motion to Intervene.

¹ Providence Everett Medical Center (PEMC) has changed its name to Providence Regional Medical Center Everett (Providence Everett). The names may be used interchangeably in these proceedings.

The Prehearing Conference was convened on December 4, 2008. At the Prehearing Conference, the Board reviewed with the parties the legal issues in the case, the Board's procedures, and the schedule of motions, briefing and hearing. On December 8, 2008, the Board received Petitioners' Clarification of Legal Issues as requested by the Board at the Prehearing Conference. On December 10, 2008, the Board issued its Prehearing Order and Order on Intervention.

On December 22, 2008, the Board received the City of Everett's Filing of Core Documents:

City of Everett 2007 Comprehensive Plan Update
Draft Supplemental Environmental Impact Statement, March 17, 2008
Final Supplemental Environmental Impact Statement, May 22, 2008

A motion to supplement the record was subsequently filed by Petitioners, and dispositive motions were filed by the City and by Intervenor Providence Everett.

II. MOTION to SUPPLEMENT

On December 5, 2008, the Board received the City of Everett's Index of Record, stating that the City anticipated filing a supplement to the Index to include additional documents identified by Petitioners, including the transcripts to various hearings.

On December 23, 2008, the Board received Petitioners' Motion to Supplement Record, with Exhibit A: a letter to Eric Laschever dated December 17, 2008, attaching an email string between Jeffrey McClimans and City of Everett staff dated August 26, 2008.

On December 23, 2008, the Board received City of Everett's Second Supplemental Index of the Record. The Second Supplement listed the preliminary agendas and minutes for City Council meetings on August 20 and 27, 2008, and the email from Jeffrey McClimans dated August 27, 2008.

On January 5, 2009, the Board received City of Everett's Response to Petitioners' Motion to Supplement the Record, attaching an updated Index of the Record in three exhibits (**Updated Index**). The Updated Index indicates corrections and additions identified by the City subsequent to the Second Supplemental Index of the Record.

Applicable Law

RCW 36.70A.290(4) provides:

The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

Discussion

Petitioners' motion raises three objections to the record Index provided by the City.

- The Index is not accurate and meaningful. Specific information about documents is lacking, so that it is difficult to match documents in Petitioners' files with the City's Index numbers.
- The Index is not complete and will need further supplementation.
- The City should provide Petitioners a complete copy of the documents in the record.

The City's response points out that its duty under the GMA and the Board's rules is to provide an Index of the documents in its record and to give Petitioners reasonable access to the documents so that they may select and copy, at their own expense, relevant materials. The City's Updated Index incorporates a number of additions and clarifications. The City commits to continuing to work with Petitioners and to update the Index, if necessary, to ensure that none of its materials has inadvertently been omitted.

The Board notes that supplementation of the record may be granted where a party seeks to introduce material *beyond* the City's documentation of its legislative process, if the material is determined to be "necessary or of substantial assistance" to the Board in its deliberations. RCW 36.70A.290(4). In the present case, the parties have been disputing whether the City's Index properly includes and identifies all the documents which should be contained *within* the legislative record, including submissions by Petitioners. The City has updated (and indicates it will continue to update) the Index to ensure that Petitioners' materials are included. No one has moved that the record be supplemented with additional evidence outside the City's legislative process.²

The City is correct in asserting that it is obligated to provide Petitioners reasonable opportunity to inspect the record and to copy requested documents at Petitioners' cost. The City is not required to reproduce the whole record for Petitioners or for the Board.

Conclusion

The Board finds and concludes that the Updated Index includes materials that the City had previously omitted and provides sufficient identification of documents. Petitioners' Motion to Supplement is **denied**.

III. DISPOSITIVE MOTIONS

On December 15, 2008, the Board received the City of Everett's Dispositive Motion, with three attachments (**City Motion**), and Providence Regional Medical Center Everett's Motion to Dismiss Certain Claims, with two attachments (**Providence Everett Motion**). The City of

² The parties have submitted various extra-record documents filed in the parallel Superior Court proceeding. No motion to supplement the record has been filed concerning these documents.

Everett and Intervenor Providence Everett request dismissal of Petitioners' issues as applied to Ordinance 3090-08 Section 2 (rezoning) and Section 3 (master plan). They also request dismissal of references to noncompliance with EMC Title 15 and Chapter 19.33B as stated in Legal Issues 1 and 5.

On January 7, 2009, the Board received Petitioners' Response to Respondents Dispositive Motions and (Second) Clarification of Legal Issues (**NENA Response**).

On January 14, 2009, the Board received City of Everett's Rebuttal to Petitioners' Response to Dispositive Motion (**City Reply**), with 3 attachments, including Chapter 15 EMC and chapter 19.33B EMC. The Board also received Intervenor's Rebuttal to Petitioners' Response to Motion to Dismiss (**Providence Everett Reply**).

On January 20, 2009, the Board received Petitioners' Objections to City and Providence Rebuttals in Support of Their Dispositive Motions.

On January 23, 2009, the Board received City of Everett's Response to Objections to City and Providence Rebuttals. The Board also received Intervenor's Rebuttal to Petitioners' Response to Motion to Dismiss.

Neither the Petitioners' January 20 nor the City and Intervenor's January 23 submittals were authorized in the briefing schedule; nor did the Board request such submittals. The Board will accord these untimely submittals the weight they deserve.

The City Motion and Providence Everett Motion seek dismissal of certain issues for lack of subject matter jurisdiction. The Board deals first with the question of its jurisdiction to deal with the City's rezone of the area and adoption of the Master Plan. Then the Board takes up the question of its jurisdiction with respect to the City's alleged non-compliance with its municipal code.

A. Jurisdiction – Rezone and Master Plan

Applicable Law

Matters that are subject to Board review are set forth in RCW 36.70A.280, which provides in relevant part:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

RCW 36.70A.290(2) authorizes petitions to the Boards “relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter...”

RCW 36.70A.030(7) defines “development regulations:”

- (7) "Development regulations" or "regulation" means the *controls placed on development or land use activities* by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation *does not include a decision to approve a project permit application*, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

(Emphasis supplied.)

The Challenged Action and Related Litigation

In 2007, Providence Everett reached an agreement with Everett Community College (ECC) whereby the hospital would acquire nine acres of adjacent property then owned by the College and used for athletics. In order to incorporate the college property into the existing 14-acre hospital campus, the hospital applied to the City for (1) a comprehensive plan amendment, (2) rezoning from residential (R-2) to Institutional Overlay Zone, and (3) a Development Master Plan for the ECC property.³ The proposed amendments were initiated in June of 2007 as part of the City’s annual review cycle of its GMA plans and development regulations. RCW 36.70A.130(2).⁴

Ordinance No. 3090-08, adopted in September 2008, comprises three actions:

- amends the City’s Comprehensive Plan land use policies and the Plan’s land use map,
- rezones the ECC area from R-2 (single Family) to R-2-I (Institutional Overlay with Master Plan), and
- prospectively adopts an amended Master Plan for the combined Providence Everett area.

“Comprehensive Plan Conclusions” are Conclusions 1-8 of the Ordinance; the Comprehensive Plan land use map and Land Use Policy 2.11.4 are amended in Section 1 of the Ordinance.

³ See Ordinance No. 3090-08, WHEREAS, ninth paragraph.

⁴ See Ordinance No. 3090-08, WHEREAS clauses describing the procedural history of the ordinance.

“Rezone Conclusions” are Conclusions 12-16 of the Ordinance; the property is rezoned from R-2 to R-2-I (Institutional Overlay Zone with Master Plan) in Section 2 of the Ordinance. Conclusion 16 provides: “The rezone is necessary to implement the Comprehensive Plan Amendment designating the ECC Property for Hospital (2.4) use.”

“Master Plan Conclusions” are Conclusions 17-18 of the Ordinance. Section 2 of the Ordinance adopts and attaches the Master Plan for the ECC property as integral to the Institutional Overlay Zone. This Master Plan is attached as Exhibit A. Section 3 of the Ordinance prospectively adopts a combined Master Plan for the whole area (existing 14-acre campus and new 9-acre ECC property).⁵

Petitioners filed a Petition for Review with this Board, challenging compliance with various provisions of the GMA and SEPA. Concurrently, Petitioner Neighbors for Neighborhoods filed a challenge in Snohomish County Superior Court⁶ under the Land Use Petition Act, RCW 36.70C, which provides the exclusive avenue of review of land use project permit decisions. The parties have submitted various pleadings and correspondence from the Superior Court proceeding as evidence in the matter before the Board. Upon consideration, the Board **strikes** the attachments to pleadings in this case which are papers prepared for and filed in the Superior Court proceeding. The Board will **disregard** extra-record submissions unless supported by a motion to supplement the record.⁷ Because the issues before the Court and before this Board are different, because Petitioner NENA is not a party to the Court proceedings, and because the parallel proceedings have already generated confusion, the Board will not accept pleadings or correspondence from the Superior Court proceedings without a clear showing of relevance and necessity.

Positions of the Parties

Respondent City of Everett and Intervenor Providence Everett move to dismiss Petitioners’ challenge to the adoption of the Institutional Overlay zone and adoption of the Master Plan, asserting these actions are site-specific rezone actions *i.e.* project permit decisions.⁸ The City and Providence Everett assert that the Board lacks jurisdiction to review site specific rezones that are authorized by a comprehensive plan and lacks jurisdiction to review the Master Plan.⁹ Neither the City nor Intervenor challenges the Board’s jurisdiction to review the amendments to the Comprehensive Plan Policies or land use map.¹⁰

⁵ The combined Master Plan is not before us.

⁶ *Neighbors for Neighborhoods v. City of Everett, et al.*, Snohomish County Superior Court No. 08-2-07289-2 (Honorable Bruce Weiss).

⁷ Disregarded documents from Snohomish County Superior Court Cause No. 08-2-07289-2 include: December 2, 2008 letter from Peter Eglick to Eric Laschever; December 17, 2008 letter from Jane Kiker to Eric Laschever; Land Use Petition of Neighbors for Neighbors; Stipulated Order for Case Schedule; Petitioner’s Opening Brief.

⁸ Providence Everett Motion to Dismiss, at 1-8; and City Motion, at 2-3.

⁹ *Id.* at 4 and 2, respectively.

¹⁰ *Id.* at 1-8 and 2-3, respectively.

In response, Petitioners claim that the adoption of the Plan amendments, rezone to Institutional Overlay Zone, and Master Plan was a “package deal” within the Board’s jurisdiction to review.¹¹

In reply, the City and Providence Everett repeat their assertions, citing additional authorities.¹² The City contends that it is at risk of inconsistent decisions if proceedings before this Board overlap issues being decided in Superior Court. *Id.*

Board Discussion

It is undisputed that the City of Everett is required to plan pursuant to the GMA.¹³ As such, the City is required to adopt a comprehensive plan and *development regulations that are consistent with and implement the comprehensive plan*.¹⁴ The Board has jurisdiction over petitions “relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter...”¹⁵ However, land use project permit decisions are subject to challenge in Superior Court pursuant to the Land Use Petition Act, and are not within the purview of the Board to review.¹⁶ How do these principles apply to the City’s adoption of Ordinance No. 3090-08?

According to the Findings in the Ordinance, three actions were **required** to make the ECC property available for hospital use:

15. To achieve the requested land use changes, the City Council must (a) amend the Comprehensive Plan land use map designation for the ECC Property from College (2.2) to Hospital (2.4); (b) rezone the ECC Property from R-2 (Single Family) to R-2-I (Institutional Overlay); and (c) approve PEMC’s Master Plan for the ECC Property, as amended with the Staff and Planning Commission recommended revisions contained in Exhibit A.

The City’s existing plan and development regulations did not authorize Providence Everett to expand into the area without enactment of all three changes.

Comprehensive Plan Amendment. Section 1 of the Ordinance amends the Comprehensive Plan future land use map (**FLUM**) for the ECC Property and also amends Land Use Policy 2.11.4. As Ordinance Finding 15 states: “To achieve the requested land use changes, the City Council must (a) amend the Comprehensive Plan land use map designation....” None of the

¹¹ NENA Response, at 2.

¹² City Reply, *passim*; Providence Everett Reply, *passim*.

¹³ RCW 36.70A.040(1).

¹⁴ RCW 36.70A.040(3)(c).

¹⁵ RCW 36.70A.290(2).

¹⁶ RCW 36.70C.030.

parties disputes the Board's jurisdiction to review a challenge to these Comprehensive Plan amendments under the GMA.

Rezone and Institutional Overlay. Section 2 of the Ordinance rezones the area from R-2 to R-2-I Institutional Overlay. Ordinance Finding 15, noted *supra*, verifies that the rezone is necessary to implement the amended Comprehensive Plan. Similarly, Ordinance Conclusion 16 states: "The rezone is necessary to implement the Comprehensive Plan Amendment designating the ECC Property for Hospital use." The Board finds and concludes that it has jurisdiction to review the challenge to the concurrent rezone and Institutional Overlay, which was necessary to implement the Comprehensive Plan amendment, as set forth more fully below.

RCW 36.70A.130(2)(a) requires each city and county to establish a process whereby the jurisdiction, on an annual basis, may consider proposed amendments to its comprehensive plan. Such amendments are reviewed together to ensure that cumulative impacts are understood. *Id.* The GMA requires that "[a]ny amendment of or revisions to development regulations shall be consistent with and implement the comprehensive plan."¹⁷

The GMA gives the Board jurisdiction over petitions challenging amendments to development regulations, which include zoning.¹⁸ CTED's guidelines¹⁹ explain that amendments to plans and development regulations must often be enacted concurrently.

[B]ecause development regulations must be consistent with the comprehensive plans, substantive amendments to such regulations will frequently need to be accompanied by a comprehensive plan amendment. Since comprehensive plans can be amended only once a year, consideration of significant changes in the land use management scheme will, by and large, become an annual affair.

WAC 365-195-865.

...Whenever amendments to comprehensive plans are adopted, consistent implementing regulations or amendments to existing regulations should be enacted and put into effect concurrently.

WAC 365-195-810(1).

Most cities and counties in the Central Puget Sound have adopted annual docketing processes whereby proposed rezones and other development regulation amendments are considered concurrently with their related comprehensive plan amendments. In this way, proposed

¹⁷ RCW 36.70A.130(1)(d).

¹⁸ RCW 36.70A.030(7).

¹⁹ RCW 36.70A.320(3) requires the Board, in making its determinations, to consider the guidelines adopted by CTED pursuant to RCW 36.70A.190(4).

rezones and development regulation amendments that were *not* previously authorized in the adopted comprehensive plan can be appropriately considered together with proposed comprehensive plan amendments to ensure consistency. When the resulting actions are appealed to this Board, the Board has jurisdiction over the various components of the challenged action – comprehensive plan and future land use map amendments, rezone, and amendments to development regulations.²⁰

Thus Everett’s Land Use Code, Chapter 15.16, in the section on Review Process VA, acknowledges that an “area rezone in conjunction with a comprehensive plan change” is a “legislative decision,” not subject to “local project review procedures” or LUPA appeal.²¹

In contrast, site-specific rezones *already authorized by a comprehensive plan* must be appealed under LUPA. *Woods v. Kittitas County*, 162 Wn.2d 597; 174 P.3d 25 (2007). In *Woods*, the Court had before it a site-specific rezone that was already within the authority of an unchallenged comprehensive plan and unchallenged development regulations.²² Under those circumstances, the Court ruled that it could not reach back in a LUPA action to determine whether the comprehensive plan was compliant with the GMA. The Court stated:

A site-specific rezone *authorized by a comprehensive plan* is treated as a project permit subject to the provisions of chapter 36.70B RCW. RCW 36.70B.020(4). In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent “with applicable development regulation, or in the absence of applicable regulations the adopted comprehensive plan.” RCW 36.70B.030(1).

Emphasis supplied.

In essence, the *Woods* Court concluded that in reviewing a LUPA petition, the Superior Court does not have subject matter jurisdiction to consider violations of the GMA – such timely challenges are within the subject matter of the Growth Boards.

²⁰ See: *Halmo v. Pierce County*, CPSGMHB 07-3-0004c, Final Decision and Order (Sep. 28, 2007); *Suquamish II v. Kitsap County*, CPSGMHB 07-3-0019c, Final Decision and Order, (Aug. 15, 2007); *Dyes Inlet Preservation Council v. Kitsap County*, CPSGMHB 07-3-0021c, Final Decision and Order, (Aug. 20, 2007); *Bothell v. Snohomish County*, CPSGMHB 07-3-0026c, Final Decision and Order, (Sep. 17, 2007); *McNaughton v. Snohomish County*, CPSGMHB 06-3-0027, Final Decision and Order, (Jan. 29, 2007); *Strahm v. City of Everett*, CPSGMHB 06-3-0033, Final Decision and Order, (Mar. 15, 2007); *Tacoma IV v. Pierce County*, CPSGMHB 06-3-0011c, Final Decision and Order, (Nov. 27, 2006); *Pilchuck VI v. Snohomish County*, CPSGMHB Case No. 06-3-0015c, Final Decision and Order, (Sep. 15, 2006); *Keesling v. King County*, CPSGMHB 06-3-0035, Final Decision and Order, (Oct. 10, 2006).

²¹ EMC 15.16.350.

²² The Board notes that the R-3 zoning at issue in *Woods* was never challenged before the GMHB as being inconsistent with or failing to implement the County’s comprehensive plan. A timely challenge as to whether the R-3 zoning implemented the provisions of the County’s Plan [Rural Element] and was consistent with the rural character of the area, as required by the GMA, could have been addressed by the Board. However, no such challenge was brought, leading to the unusual circumstances in the *Woods* case.

To resolve the present matter, the Board must determine whether the rezoning change from R-2 to R-2-I, applying the Institutional Overlay, amends development regulations within the terms of RCW 36.70A.280(1) and whether the rezone and adoption of the overlay could have proceeded without the changes to the Comprehensive Plan – were they “authorized by the comprehensive plan?” The Board finds and concludes that the rezoning and Institutional Overlay are, on their face, amendments to the development regulations governing land use for the area. Further, hospital use was not authorized by the un-amended Comprehensive Plan future land use map. The point is that the City had to amend its Plan and future land use map, as well as amend the zoning and apply the Overlay, in order “to achieve the requested land use changes.”²³ Without change to the Plan, the rezoning and overlay could not have been enacted. So the argument that this is a site-specific rezone [authorized by the prior plan] is in error. Finding 15 of the Ordinance substantiates this conclusion.

The Board therefore concludes that it has jurisdiction over the rezone of the area and the application of the Institutional Overlay Zone.

Master Plan. The Master Plan for the ECC property is adopted in Section 2 of the Ordinance as an integral component of the Institutional Overlay Zone. The Master Plan is attached as Exhibit A to the Ordinance.²⁴

In deference to the City, the Board looks to the language of the Ordinance itself to determine whether enactment of the Master Plan as part of the Institutional Overlay Zone was a general development regulation for the area or was a local project permit action.

The Board notes, first, that the Master Plan is integral to the rezone, being a requirement of the Institutional Overlay Zone under the City’s development code:

WHEREAS, Everett Municipal Code (EMC) Chapter 19.33B allows the institutional overlay zone to be established in conjunction with a master plan specifying the proposed uses of the property, development standards, and addressing other factors;²⁵

Section 2. The property ... is hereby rezoned from R-2 (Single Family) to R-2I (Institutional Overlay Zone) with a Master Plan as provided by EMC 19.33B, attached hereto as Exhibit A....

²³ Ordinance Finding 15.

²⁴ Section 3 of the Ordinance calls for Providence Everett, within six months, to submit a Master Plan that combines the plan for the ECC property with the prior-approved plan for the existing hospital campus [**Combined Master Plan**]. The Combined Master Plan is not before the Board in this appeal; rather, the Board reviews the Master Plan for the rezoned ECC property adopted in Section 2 of the Ordinance as a component of the Institutional Overlay Zone.

²⁵ Ordinance WHEREAS clause twelve, on page 2.

Second, the Ordinance consistently describes the Master Plan as a general regulation, providing allowed uses, development standards and design guidelines to be applied in review of future project permit applications.

Finding 18. The proposed Master Plan for the EMC Property, includes *design guidelines* and other *development standards* for the ECC Property, that will be *used to review each future phase of development*.

Finding 26. [The Master Plan elements are typical of general development regulations: permitted and ancillary uses; intensity of development; traffic impacts, access and parking; other impacts; phasing of development.]

Finding 34. [Staff recommends approval of the PEMC rezone] subject to the *development standards, design guidelines* and mitigation requirements incorporated in the Master Plan, attached as Exhibit A.

Finding 37. The PEMC Master Plan for the ECC Property *sets standards for the following elements of development*: [height, setbacks, lot coverage, landscaping, signs, off-street parking, etc.]

Conclusion 12. The Institutional Overlay zone, ... will be governed by the Master Plan *development standards and design guidelines*....

Conclusion 18. [Future project approval for the Utility Building must be] consistent with the *development standards and design guidelines* of the approved Master Plan.

Section 1: ... The approval of the ECC Property for PEMC use for hospital and related medical activities is governed by an *Institutional Overlay Zone Master Plan that includes development standards and design guidelines* to guide the future phasing of development on the property beyond 2030. ...

Emphasis supplied.

Finally, the Ordinance specifies that project permit actions will occur subsequently and will be subject to the Master Plan regulatory requirements.

Finding 17. Project level permits for each phase of the PEMC Master Plan for the ECC Property will be reviewed by the City at a future date, subject to information from project specific studies that will be conducted at the appropriate time, including but not limited to traffic, parking, geotech/drainage, and other studies called for by the City.

As a case in point, the Ordinance recitals indicate that PEMC's request for the rezone "included as part of PEMC's 2007 Application [an application for] a proposed Utility

Building on the north end of the ECC Property.”²⁶ The Ordinance, however, does not grant a project permit for the Utility Building. Rather, as stated in Conclusion 18: “The Utility Building, which is a Phase I project in the Master Plan for the ECC Property, is a *project* that *will require administrative approval* by the Director of Planning consistent with the *development standards and design guidelines of the approved Master Plan*.” In other words, the development regulations adopted in the Institutional Overlay Master Plan will govern subsequent local project permit review for the Utility Building.

In *Laurelhurst v. City of Seattle*, CPSGMHB Case No. 03-3-0008, Order on Motions (June 18, 2003), at 12, the Board advised:

[I]n making the determination of whether a local action is subject to the GMA generally and Board jurisdiction specifically, it is important to focus on the *substance* of that action, rather than the procedure employed or the label attached. Simply characterizing a local action as a “master plan” or employing a quasi-judicial process, rather than a legislative one, is not determinative of whether the action is properly a policy or regulation subject to GMA or a permit action that falls beyond the pale of GMA compliance. That determination must be made after reviewing many facts and factors.

In *Laurelhurst*, the Board concluded from the facts in that case that the institutional master plan at issue was a “site plan approval” not within the Board’s jurisdiction. The plain language of the Ordinance in the present case is to the contrary.²⁷

The Board therefore finds and concludes that the Institutional Overlay Master Plan adopted in Ordinance 3090-08 is a development regulation for the area, not a local project permit action. As such, it is within the Board’s jurisdiction to review Petitioners’ challenge.

Conclusion re Subject Matter Jurisdiction

The Board has subject matter jurisdiction to review Sections 1 and 2 of Ordinance 3090-08 – amendments to the Comprehensive Plan land use policies and future land use map, amendments to the zoning map rezoning the area from R-2 to Institutional Overlay Zone, incorporating the Master Plan governing development of the area. The motions of the City and Providence Everett on this question are **denied**.

²⁶ Ordinance WHEREAS clause nine, on p. 2.

²⁷ The City’s motion ignores the language of the enacted Ordinance and focuses on code provisions which the City asserts provide for a quasi-judicial review of Institutional Overlay Zone and Master Plan applications as site-specific permits. City Motion, at 2.

Jurisdiction – Code Compliance

Applicable Law

The GMA requires each planning jurisdiction to adopt its own procedures for notice and public participation.²⁸ The statute does not dictate the details of those local procedures but recognizes that different levels of process may be appropriate in different locales or for different types of decisions. Local procedures must be adopted for notice and public participation in the “development and amendment of comprehensive land use plans and development regulations implementing such plans.”²⁹

RCW 36.70A.140 provides:

Comprehensive plans — Ensure public participation.

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the *development and amendment of comprehensive land use plans and development regulations implementing such plans*. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments....

Positions of the Parties

The City and Providence Everett move the Board to dismiss Petitioners’ Legal Issue 5: Code Compliance, which alleged that the City failed to comply with its own municipal code requirements at EMC 19.33B.010 and EMC 19.33B.050.³⁰ The motions also seek dismissal of reference to EMC Title 15 and Chapter 19.33B in Legal Issue 1: Public Participation. The City and Intervenor argue that the Board only has jurisdiction over GMA compliance, not over the City’s compliance with other laws, including its own ordinances. *Id.*

In response, Petitioners **withdraw** Legal Issue 5.³¹ However, Petitioners assert that the City chose to “bundle” the process of Comprehensive Plan, rezoning and master plan amendment, so that the code provisions governing notice and meetings on map amendments and master

²⁸ RCW 36.70A.140, .035, .130(2)(a).

²⁹ RCW 36.70A.140.

³⁰ City Motion, at 3-4; Providence Everett Motion, at 8-9.

³¹ Petitioners’ Response, *passim*.

plans must be equally applicable to the Comprehensive Plan amendment. Petitioners argue that the Board thus has jurisdiction to determine whether the City violated its adopted public process. *Id.*

Board Discussion

The Board acknowledges that Legal Issue 5: Code Compliance has been withdrawn by Petitioners. The remaining question before the Board is whether it may consider EMC Title 15 and Chapter 19.33B in determining whether the City failed to comply with the GMA requirements for notice and public participation.

From the inception of Board review of GMA notice and public participation challenges, the Board has asked three questions:

- Has the city or county adopted a process for notice and public participation?
- Does the adopted procedure comply with RCW 36.70A.035, .130(2), and .140?
- In enacting the challenged ordinance, did the jurisdiction follow its adopted process [a GMA compliant process]?

The GMA requires cities and counties to adopt processes for public notice and participation in GMA planning. In public process challenges, the Board considers not only whether the jurisdiction has adopted such procedures but whether it has followed its own rules.³²

In *McNaughton v. Snohomish County*, CPSGMHB Case No. 06-3-0027, Final Decision and Order (January 29, 2007), at 22, the Board explained:

The bedrock of GMA planning is public participation. The GMA's public participation provisions require cities and counties to adopt specific procedures to ensure "early and continuous" public involvement. Thus, a jurisdiction's failure to follow the public participation procedures it has adopted pursuant to RCW 36.70A.140 constitutes non-compliance with the statute. See generally, *McVittie V v. Snohomish County*, CPSGMHB Case No. 00-3-0016, Final Decision and Order (Apr. 12, 2001), at 16-25; see also, *Fallgatter VI v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Order on Motions (June 29, 2006), at 4 (an issue which alleges that the city did not comply with its own public

³² See, e.g., *Open Frame v. Tukwila*, CPSGMHB No. 06-3-0028, Order of Dismissal (November 17, 2006), at 9:

The Board has previously held that it may, depending on the facts, have jurisdiction to review a jurisdiction's compliance with its own code. *Fallgatter v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Order on Motions at 4-5 (June 29, 2006). However, this authority to review is couched not specifically in the jurisdiction's own code but in the GMA provisions it was adopted to comply with [here] the City's procedural process for amending the comprehensive plan and development regulations including application for amendment, docketing, notice and comment, and criteria for City Council consideration.

participation requirements adopted pursuant to RCW 36.70A.140 is within the Board's jurisdiction).

In considering the Providence Everett expansion, the City of Everett combined the processing of the comprehensive plan amendments with rezoning to an Institutional Overlay Zone and Master Plan in one coordinated process, as its code appears to allow. The City's code recognizes that processing the Overlay Zone Master Plan application may require the planning commission to "review the proposed master plan, rezone, and any required amendments to the Everett general plan" in order to "make a decision regarding the proposed institutional overlay."³³

For purposes of this motion, the Board is not prepared to dismiss reference to the City's public process provisions. When Legal Issue 1 is fully briefed and argued on the merits, the Board will be cognizant of the City's different provisions for different types of review.

Conclusion re Code Compliance

For the reasons set forth above, the motions of the City and Providence Everett to dismiss references to EMC 19.33B and Title 15 in Legal Issue I are **denied**. Legal Issue 5 is **dismissed**.

IV. ORDER

Based upon review of the Petition for Review, the filings of the parties, including the briefs and exhibits submitted by the parties, the GMA, the Board's rules and prior decisions, and having deliberated on the matter, the Board ORDERS:

- Petitioners' Motion to Supplement is **denied**.
- Pleadings and correspondence introduced from Snohomish County Superior Court No. 08-2-07289-2 are **stricken** and will be disregarded. The Board will consider extra-record documents only when supported by a motion to supplement the record.
- The motions of the City and Providence Everett to dismiss Petitioners' challenge to the adoption of the Institutional Overlay Zone and incorporated Master Plan are **denied**.
- Legal Issue 5 is **dismissed**.
- The Board's decision on the motions of the City and Providence Everett to dismiss reference to City code provisions in Legal Issue 1 is **reserved** to briefing and hearing on the merits.

³³ EMC 33.B.030(C).

So ORDERED this 26th day of January, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

David O. Earling
Board Member

Margaret A. Pageler
Board Member